IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 649 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VIKRAMSINH RAMAJI VAGHELA - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
MR PR NANAVATI for Appellant(s) : 1 - 3.
MS FALGUNI PATEL, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 01/05/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. The appellants came to be tried by Sessions Court, Ahmedabad (Rural) at Gandhinagar for the offences punishable under Sections 498-A, 302 and 114 of Indian Penal Code for the murder of Vishnuba w/o appellant no.1 allegedly committed on 22.8.1999 in the afternoon around 4.00 p.m., at the appellants' house at village Piplaj by pouring kerosene over her and then setting her ablaze.

2. Appellant no.1 was married to deceased Vishnuba. Appellant no.2 is mother of appellant no.1 and mother-in-law of the deceased and appellant no.3 is the maternal aunt of appellant no.1. The case of the prosecution is that the deceased was married to appellant no.1 about two years prior to the incident. Initially, the deceased was treated properly but thereafter, the harassment from the in-laws and husband started. Appellant no.1 even doubted the fidelity of the deceased. On the day of the incident, relatives of parties had assembled to crease out the disputes and they scolded appellants. The deceased was inside the house and at that time, three persons entered the house. Appellant no.1 brought the container of kerosene, appellant no.3 caught hold of the deceased and appellant no.1 poured kerosene over her while appellant no.3 set her ablaze. As a result of this incident, the deceased sustained extensive burn injuries. She was taken to the hospital where she gave history to the doctor and the doctor gave her treatment. The police was informed. Police arranged for recording of dying declaration by the

Executive Magistrate by writing a yadi. In response to that yadi, Executive Magistrate went to the hospital and recorded the dying declaration of the deceased and then the Investigating Officer recorded the FIR of the deceased. The offence was registered and investigated. The appellants disappeared from the place of incident soon after the incident and were arrested by the police after about a week from the date of the incident upon them voluntarily appearing before the police. The Investigating Agency having found sufficient evidence filed the charge sheet against the three accused in the Court of J.M.F.C.,Gandhinagar. As the case was triable by the Court of Sessions, it was committed to the Court of Sessions by learned J.M.F.C., Gandhinagar and Sessions Case No.1 of 2000 came to be registered.

2.1. The charge was framed at Exh.5, to which all the accused persons pleaded not guilty and claimed to be tried. After examining the evidence led by the prosecution, the Sessions Court came to the conclusion that the charges against the appellants were proved and, therefore, recorded conviction for offences punishable under Section 498-A read with Section 114 of the Indian Penal Code and Section 302 read with Section 114 of the Indian Penal Code whereas convicted all the appellants for the offence of murder punishable under Section 302 read with Section 114 of Indian Penal Code by judgment and order dated 30.6.2000. Aggrieved by the said judgment and order, the original accused have preferred this

appeal.

2.2. This Court, while admitting the appeal, suspended the sentence and granted bail to appellant nos. 2 and 3 by order dated 27.7.2000 and as such appellant nos. 2 and 3 are on bail.

3. Learned advocate Mr.P.R.Nanavaty has taken us through the record and proceedings. He submitted that the yadi/vardhi sent by P.S.O., Pethapur which is at exh.27 was the first information reporting a non-cognizable offence which was reduced to writing and, therefore, that ought to have been treated as the FIR and not the FIR which was recorded by police from the deceased at a later point of time while she was under treatment at the hospital.

3.1. Learned advocate for the appellants submitted that it is a case of suicide and not murder and that is the plea of the accused from the beginning. In support of this contention, he submitted that the incident has occurred while relatives including parents of the deceased were present in the house and, therefore, such an incident could not have occurred. He also submitted that the parents of the deceased and other independent witnesses have not supported the prosecution case. The trial Court has recorded the conviction in spite of this status of the evidence only on evidence in form of dying declaration before the Executive Magistrate and history recorded by the doctor in the

medical case papers purported to have been given by the deceased. Learned advocate submitted further that the medical expert has opined that the injuries were such which would ordinarily be found in case of suicide rather than homicide. He submitted that the burns were suffered by the deceased not only in front but on the back also and that is reflected in the inquest panchanama as well as P.M.Notes. The prosecution, has therefore, come out with a concocted and incorrect version and has tried to give a story which is not true or probable. He submitted that the dying declaration recorded by the Executive Magistrate would be hit by Section 161 of the Criminal Procedure Code and could not have been relied on by the trial Court. Apart from that, he submitted that the evidence of recording of dying declaration is inconsistent. The Executive Magistrate gives a version which is not consistent with the version given by the police witnesses. This makes the dying declaration doubtful and question strikes as to whether the dying declaration was recorded in the manner suggested by the witness.

3.2. Learned advocate submitted that according to the evidence of the parents of the deceased, the deceased was not educated, obviously she could not have signed either the dying declaration or the FIR and it is a fact of record that both these documents contained signature of the deceased and not thumb impression. He also submitted that the evidence is not so reliable or up to the mark and, therefore, the

story of the prosecution is not above suspicion. The manner in which the investigation is carried out would go to show that investigation has not been carried out efficiently or honestly and benefit therefore must be given to the accused persons. He submitted that appellant no.1 is in jail since 27.8.1999 the date of arrest whereas appellant nos. 2 and 3 were on bail during the trial as well as the pendency of the appeal. He, therefore, submitted that the appeal may be allowed and conviction may be set aside.

4. Learned APP Ms.Patel has opposed this appeal. According to her, the objections raised regarding manner of recording of dying declaration are of no significance. It is not always necessary that the Executive Magistrate must obtain a certificate from a doctor about the state of mind and physical condition of the declarant nor it can be said that in absence of such certification by the doctor, the dying declaration would lose its evidential value. Once the officer recording the dying declaration is satisfied about the state of health and mental condition of the declarant, it is sufficient as held by the Apex Court in the case of Laxman V/s State of Maharashtra (2002) 6 SCC 710. She submitted that, therefore, the dying declaration as well as the history recorded by the doctor in the medical case papers are good enough to establish the case against the appellants. She submitted further that the conduct of the appellants in absconding for

about seven days after the incident is also significant. If the incident had occurred in the manner suggested by the defence, i.e., suicide, there was no reason for the appellants to flee for about seven days. It was, therefore, submitted that the trial Court's judgment may not be interfered with in exercise of appellate powers. The appeal may, therefore, be dismissed.

5. We have examined the Record and Proceedings in light of the contentions raised before us by rival sides. It is not disputed by the defence that the deceased died of burn injuries. The question that arises for determination of this Court is that whether burns were suicidal or homicidal. In this regard, if the medical evidence in form of P.M.Notes Exh.17 and deposition of Dr.Dahyabhai Khodidas Patel Exh.16 are seen, it is found that the deceased had sustained extensive burns more on front portion of the body and less on the back. The burns were to the extent of 85% as per the evidence of the doctor. The doctor has opined that the burns injuries were of a nature which can be caused in case of suicide. The doctor denies the suggestion that a person with 85% burns would not be in a position to speak. He admits that if the kerosene is sprinkled on a person from front, the front portion of the body would sustain greater area of burns as compared to the back and there may not be burn injuries on the back. The cause of death has been certified to be extensive burns.

5.1 Now to decide the question whether the deceased suffered homicidal burns or suicidal burns, we have to examine the evidence led by the prosecution. In this regard, at the outset, it may be recorded that Lilaba Kuberji Exh.11 who is the mother of the deceased has taken a somersault with her original version and came out with a case that the deceased told her while being taken to hospital in the auto-rickshaw, that she sustained accidental burns. The witness has been treated as a witness hostile to the prosecution. Her original version to which she has given a go-bye is proved through cross examination of the witness and the evidence of the Investigating Officer who recorded the statement of this witness.

5.2. PW No.2 Kuberji Chhaguji Chavda is examined at Exh.15. He happens to be the father of the deceased and father-in-law of appellant No.1. He says that he has two daughters Suryaben and Vishnuba. They were both married at village Piplaj. On the day of the incident, he had gone to village Piplaj to meet Suryaba and was staying at her house. He says that he went to the house of deceased and found that some more guests have also come. There was no dialogue with deceased Vishnuba, but suddenly she ran out of the house. At that time, the witness says that his son-in-law (appellant No.1) and others were sitting together in the lounge. This witness is also treated as hostile to the prosecution. This witness

comes out with a case that the deceased had become unconscious and did not speak to any one. This is just contrary to the version given by PW 1 that the deceased talked to her in auto-rickshaw and indicated that she had committed suicide.

5.3 Talubha Fatubha Zala Exh.18 is the Executive Magistrate who recorded the dying declaration. He says that on receiving yadi, he went to the Civil Hospital and recorded the dying declaration of Vishnuba. He states that before recording the statement, he satisfied himself that the deceased was in fit state of health and mind and thereafter, he started recording the statement. He then goes on to state the contents of the dying declaration. The witness has been cross-examination at length where he says that he went to the hospital, verified about the patient from the ward nurse, ensured that there was nobody around the deceased and then recorded the statement of the deceased. He, however, admits that he did not introduce himself as such. He also admits that he had not made inquiries with the doctor about the status of health and mind of the deceased or whether the deceased was administered pain killers and sensitives. He says that when he entered the cabin in which the deceased was being treated, he asked the relatives of the deceased to leave the room. He then recorded the statement by putting questions to her from the format of dying declaration and recorded the answers. He says that he did not notice any injury on back of the deceased or any

bandages having been applied to the deceased on the back.

5.4. The dying declaration is at Exh.20 wherein the deceased is said to have indicated that the incident had occurred at 16.00 hours on 22.8.1999. She also stated that on 22.8.1999, her maternal uncle and maternal aunt had gone to Piplej. They came to their house also and rebuked her husband as he was not treating the deceased properly. It is also stated in the dying declaration that appellant no.1 had poured kerosene over the deceased and appellant no.2 ignited match stick and at that time, her maternal aunt was present who caught hold of her and did not permit her to escape. She has indicated that her husband appellant no.1 would not keep her with him.

5.5. Panch witness Laljibhai Kuberji Vaghela Exh.21 is examined to prove the panchanama of place of incident at Exh.22.

5.6. Vikramsinh Gobarji Bhati Exh.26 was the P.S.O. On duty on the Unava outpost on 22.8.1999. This witness made an entry in the telephone vardhi took. The said entry is at Exh.27. He proves the contents and writing of the entry. He says that he obtained a report from the doctor about the state of health and mind of the victim and, thereafter, recorded the FIR of the deceased. He is cross-examined at length and it emerges from the cross-examination that he had not asked the declarant as to whether she is educated or

not but he certainly states that the declarant had voluntarily told him that she is educated. In earlier part of the cross-examination, he has stated that the declarant was under treatment and was in pain. She would reply if she is asked. It was, therefore, contended that these two statements of the witness are contradictory. In our opinion, though these two statements appear to be contradictory prima facie, there is no material contradiction which would go to the root of the case. The declarant deceased was replying to the questions put to her while her FIR was being recorded by the witness and may have stated that she is educated. This reply has come from the witness during cross-examination. It is not that the deceased signed only in the FIR but she has signed before the Executive Magistrate in the dying declaration also and, therefore, the statement in the deposition that she would reply if she is asked will have no consequence.

5.7. P.W.7 Bharatkumar Amrutlal Patel is the Investigating Officer examined at Exh.29. From his deposition, it emerges that the appellants were not traceable till 29.8.99 when they surrendered to the police at the police station. In the meantime, deceased had expired on 27.8.99. The Investigating Officer has also admitted during cross-examination that from the statements of witnesses from Khoraj, there was no incriminating evidence connecting the appellants with the crime. All that the witnesses said was that they had seen the deceased coming out

of the house in burning condition. It was contended by learned advocate for the appellants that the prosecution has deliberately not examined these witnesses. In our opinion, if the witnesses have seen the deceased coming out of the house in a burning condition and have not witnessed the occurrence, examining them would not carry the prosecution case any further nor would it help the defence in any manner. Non-examination of these witnesses, therefore, cannot lead to drawing of an adverse inference against the prosecution.

5.8. The dying declaration is at Exh.20 where the deceased clearly implicates all three appellants specifically and in terms. The Executive Magistrate Talubha has stated that he recorded the dying declaration of the deceased after satisfying himself about the fit state of mind and there he obtained the signature. The witness has stood the test of cross-examination and has clearly come out with a case ruling out the possibility of the deceased being unconscious or being not in fit state of mind or being under sedation and not being able to speak. The Executive Magistrate is an independent person in employment of the State and is free from prejudices for or against any of the parties. Nothing is indicated to us good enough to doubt the veracity of this witness. Further, there is nothing to doubt the truthfulness of the version given by the deceased in the dying declaration. Her version is consistent both in the dying declaration as well as her FIR and that

is reflected even in the vardhi at Exh.27. The charge of murder against the appellants thus gets proved.

6. As to the question whether the complaint given by the deceased can be considered as the FIR or not, suffice it to say that Exh.20 is the dying declaration which is recorded prior in point of time and it discloses commission of the offence by the accused appellants. Likewise, telephone vardhi Exh.27 also contains full details regarding cognizable offence which was reduced to writing. Under the circumstances, we may not treat the complaint of the deceased as the FIR but that would hardly make any difference for the reason that the said complaint of the deceased before the police at Mark 9/1 would assume the shape of a dying declaration. That also clearly implicates the appellants.

7. Now, considering the question whether it is a case of suicide or homicide, the only factor that remains to be considered is the opinion of the doctor that the nature of burns sustained by the deceased were indicative of suicidal burns. It is only an opinion of an expert, which is negatived by other cogent evidence. What could be better than the dying declaration properly recorded by an independent officer of the rank of Executive Magistrate? In our view, opinion of doctor will not abrogate the effect of evidence in form of dying declaration. We are, therefore, of the view that the death being homicidal is also properly proved by the prosecution.

8. In light of the above discussion, there can never be second thought in confirming the view taken by the trial court and recording conviction of the appellants for the offence of murder. The evidence is cogent and reliable in form of dying declaration and yadi.

9. We notice that there is no evidence so far as offence punishable under Section 498-A is concerned except a stray averment in the FIR. The parents of the deceased have not supported the prosecution case. The deceased has not stated anything in this regard so far as the dying declaration is concerned. The statement of the deceased, therefore, cannot take place of substantive evidence. The conviction under Section 498-A, therefore, cannot be sustained.

10. The appeal, therefore, stands partly allowed. The conviction of the appellants under Section 498-A read with Section 114 of the Indian Penal Code is hereby set aside whereas the conviction for offence punishable under Section 302 read with Section 114 of the Indian Penal Code stands confirmed. The appellant nos. 2 and 3 shall surrender to custody within four weeks.

(A.L.DAVE, J)

(SHARAD D DAVE, J)

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